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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

RUDY HILADO et al.,	
Plaintiffs and Appellants,	E046093, E046576
v.	(Super.Ct.No. INC073349)
AQUA FARMING TECH, INC.,	OPINION
Defendant and Respondent.	

APPEAL from the Superior Court of Riverside County. Harold W. Hopp, Judge. Affirmed.

Bunagan, Marapao & Valdez, J. Flores Valdez and Abundio D. Marapao, Jr., for Plaintiffs and Appellants.

Best, Best & Krieger, Douglas S. Phillips and Kira L. Klatchko for Defendant and Respondent.

After the court entered a judgment of default and granted a writ of execution against defendant Aqua Farming Tech., Inc., Aqua filed a request for an order to shorten the time for a hearing on its proposed motion to set aside the default and to stay the writ

of execution. The court granted the motion. Plaintiffs Rudy Hilado and Filipina Hilado (collectively, plaintiffs) appealed (case No. E046093). Shortly thereafter, Aqua filed its motion to set aside the default alleging that plaintiffs had failed to properly serve it. The court granted the motion "on the ground that [Aqua] was not properly served." Plaintiffs appealed that order (case No. E046576); this court consolidated the appeals.

Plaintiffs contend that because a judgment of default had been entered as to Aqua, Aqua had no standing to request an order shortening the time for hearing its proposed motion to set aside the default or to stay the writ of execution; thus, plaintiffs maintain that the court lacked authority to rule on Aqua's request. Plaintiffs additionally contend that the court abused its discretion in setting aside the default judgment because Aqua had been served with the summons and complaint and had actual notice of them. Aqua responds that both orders from which plaintiffs appeal are nonappealable. Regardless, Aqua contends that the court had authority to rule on its request to shorten the time to hear its proposed motion to set aside the default and stay the writ of execution. Moreover, Aqua contends the court acted within its discretion in granting the motion to set aside the default.

We reject Aqua's contention that the orders are not appealable. Moreover, we hold that the court did have authority to rule on Aqua's request. Additionally, we hold that the trial court acted within its discretion in granting Aqua's motion to vacate the default. Thus, we affirm the judgment in full.

FACTUAL AND PROCEDURAL HISTORY

On December 26, 2007, plaintiffs filed a complaint against defendants Rocky French and Alicia French (the French defendants) as officers of the corporation, and Aqua, the corporation itself, seeking dissolution of the corporation due to alleged mismanagement and failure to render an accounting of its business. On February 5, 2008, the French defendants filed a demurrer to the fourth through sixth causes of action enumerated in the complaint. On February 20, 2008, plaintiffs filed a first amended complaint. On March 26, 2008, the French defendants filed their answer to plaintiffs' first amended complaint. On April 7, 2008, plaintiffs demurred to the French defendants' answer to plaintiffs' first amended complaint. On April 28, 2008, the French defendants filed an amended answer to plaintiffs' first amended complaint.

On May 1, 2008, plaintiffs filed a request for entry of default against Aqua based on its failure to respond to plaintiffs' first amended complaint. Attached to plaintiffs' request for entry of default was a letter dated December 20, 2007, addressed to plaintiffs' attorney from Aqua's attorney, Joseph A. Gibbs, indicating that he was "authorized to accept service of the Summons and Complaint on behalf of [Aqua] and Rocky French. Please forward the Summons and Complaint accompanied by a Notice & Acknowledgement of Receipt." The bottom of the letter bears the signature of a Laura Hassan dated December 28, 2007, indicating receipt of the summons for Aqua and the French defendants.

On June 6, 2008, the court entered a judgment of default against Aqua in the amount of $230,126. On June 9, 2008, the court issued a writ of execution in the amount

of the judgment plus fees and interest. On June 19, 2008, Aqua filed an ex parte application for an order shortening time to serve and file a notice of motion and motion for relief from entry of judgment and order to suspend execution of the judgment. In its request, Aqua averred that it had never been served with the summons and complaint, the first amended complaint, the request for entry of default, the request to set uncontested matter, or the judgment.

Aqua's attorney acknowledged that "Laura Hassan is a receptionist in our office." However, it contended that, "[a]s noted by the accompanying Declaration of Laura Hassan, [she] was merely signing the document evidencing her physical receipt of the Summons and Complaint, not that she was authorized to accept the actual service of the documents." The attached declaration of Hassan indicated that she was a receptionist employed by the firm of Joseph A. Gibbs & Associates. She declared that the signature on the letter "is in fact my signature." However, she did not recall whether the language written beneath her signature indicating that she was receiving the summons on behalf of defendants existed at the time she signed it. Moreover, she averred that she was not authorized to accept service of the Summons and Complaint on behalf of that client, and that she "did not show the letter to Mr. Gibbs because [she] did not believe that it had any legal significance, other than establishing that [she] had physically received the letter." Thus, Aqua essentially contended that because plaintiffs did not execute service in the manner requested by Aqua's attorney, i.e., by notice and acknowledgement of receipt, such service was ineffective.

On June 20, 2008, plaintiffs filed opposition to Aqua's ex parte request. Plaintiffs contended that Aqua's request lacked good cause and that the court lacked jurisdiction to hear the motion until Aqua had succeeded in having the default set aside. After a hearing on June 20, 2008, the court granted Aqua's request ordering a stay of judgment pending a hearing on the proposed motion to vacate the default and ordering the motion be served and filed no later than June 23, 2008. Plaintiffs filed an appeal from that order on June 23, 2008.

On June 23, 2008, Aqua filed its motion to set aside the default. Aqua again contended that service of the first amended complaint was legally insufficient because it was not conducted in the manner requested by its attorney. Plaintiffs filed opposition to the motion asserting that Aqua had failed to state adequate grounds for relief under Code of Civil Procedure section 473[1] and that, due to Aqua's attorney's response to the summons and complaint on behalf of the French defendants, Aqua had actual and constructive notice of the summons and complaint. Plaintiffs further noted that Hassan had accepted receipt of the summons and complaint "as an employee of Joseph Gibbs and Associates."

At the hearing on August 15, 2008, the court granted Aqua's motion to vacate the default finding that "the first amended complaint was apparently served by mail on the corporation, which had not yet appeared, and therefore the Court did not have personal jurisdiction over the corporation and [it] needed to be personally served." On September

[1] All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

4, 2008, plaintiffs filed an appeal from the minute order of the hearing. A final signed judgment was entered on September 11, 2008, granting Aqua's motion to set aside the default judgment "on the ground that [Aqua] was not properly served."

DISCUSSION

A. Appealability

1. *Plaintiffs' Appeal From the Order of June 20, 2008*

Aqua contends that plaintiffs' appeal from the June 20, 2008, order shortening the time for it to file its motion for relief from default and suspending execution of judgment is not appealable. Thus, Aqua maintains this court must dismiss the appeal. Plaintiffs reply that the order was final and appealable because it affected the judgment by relating to its enforcement. We agree with plaintiffs that the portion of the order suspending execution of the judgment affected that judgment by staying its execution; thus, that portion of the order was appealable.

An order after judgment is appealable pursuant to section 904.1 if three criteria are met: (1) the underlying judgment must be final; (2) the issues raised by the appeal must be different from those arising from an appeal from the judgment; and (3) "'the order must either affect the judgment or relate to it by enforcing it or staying its execution.' [Citation.]" (*Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 651-652.) An order quashing a writ of execution is appealable as a special order after judgment that relates to the enforcement of the judgment. (*In re Marriage of Green* (2006) 143 Cal.App.4th 1312, 1319.) Thus, the order suspending execution of judgment was appealable.

Here, the portion of the order shortening the time for Aqua to file its motion to vacate the default did not affect the judgment or relate to it by enforcing it or staying its execution. Accordingly, that portion of the order itself was not appealable. However, the order was preliminary to the court's subsequent order vacating the default judgment. Thus, the appeal from the order vacating the default judgment allows review of the earlier preliminary nonappealable order shortening time. (Cf. *P R Burke Corp. v. Victor Valley Wastewater Reclamation Authority* (2002) 98 Cal.App.4th 1047, 1054-1055 [appeal from final order determining amount of fees allows review of earlier nonappealalbe order regarding entitlement to fees].)

2. *Plaintiffs' Appeal From the Order of August 15, 2008*

Aqua contends that because plaintiffs filed their notice of appeal on September 4, 2008, from the minute order issued on August 15, 2008, rather than the formal order setting aside the default judgment entered on September 11, 2008, they did not appeal a final appealable order. Therefore, plaintiffs maintain, the appeal must be dismissed. However, pursuant to California Rules of Court, rule 8.104(e)(1), "[a] notice of appeal filed after judgment is rendered but before it is entered is valid and is treated as filed immediately after entry of judgment." "The entry date of an appealable order that is entered in the minutes is the date it is entered in the permanent minutes. But if the minute order directs that a written order be prepared, the entry date is the date the signed order is filed." (Cal. Rules of Court, rule 8.104(d)(2).)

Here, the minute order dated August 15, 2008, while noting that Aqua's motion to set aside judgment by default was granted, also directed: "Formal Order to be prepared,

served and submitted by counsel for [Aqua]." Thus, the minute order was not an appealable judgment. Nevertheless, because a final, formal, signed order was entered on September 11, 2008, we treat the appeal as filed immediately thereafter. Thus, the appeal will stand. (*Marrujo v. Hunt* (1977) 71 Cal.App.3d 972, 976, fn. 2.)

B. Aqua Had Standing to File and the Court Had Jurisdiction to Hear Aqua's Ex Parte Applications

Plaintiffs contend that because judgment of default had been entered, Aqua had no standing to file any documents other than the motion to vacate the default itself. Hence, plaintiffs maintain the court was without jurisdiction to rule on Aqua's ex parte applications. We hold that because Aqua's ex parte applications expressly related to its proposed filing of the motion to vacate the default, it had standing to file them and the court had jurisdiction to hear them.

Aqua cites *Howard Greer Custom Originals v. Capritti* (1950) 35 Cal.2d 886 (*Howard*), for the proposition that "'[a] defendant against whom a default has been entered is out of court and is not entitled to take any further steps in the cause affecting plaintiff's right of action; he cannot thereafter, until such default is set aside in a proper proceeding, file pleadings or move for a new trial, or demand notice of subsequent proceedings . . . .'" (*Id*. at pp. 888-889.) However, in *Howard* the defendant had sought only to set aside and vacate the judgment alone, not the default. (*Id*. at p. 888.) Thus, the *Howard* court noted that even if the defendant had been granted the relief requested, it "'would have been an idle act, because the default . . . would have stood undisturbed.'" (*Ibid*.) Thus, "[i]f the judgment were vacated it would be the duty of the court

immediately to render another judgment of like effect, and the defendants, still being in default, could not be heard in opposition thereto. . . .' [Citations.]" (*Id.* at p. 889.) Here, Aqua sought and received relief from the default, not simply relief from the judgment. Moreover, defendant's filings prior to filing its motion to set aside the default related directly to the anticipated motion to set aside the default. Thus, unlike *Howard*, since the court granted the relief defendant requested it would not be required to immediately enter "another judgment of like effect."

In *Sporn v. Home Depot USA, Inc*. (2005) 126 Cal.App.4th 1294, the defendant conceded that it had been properly served with the summons, complaint, and request for entry of default. (*Id*. at p. 1298.) Nevertheless, it did not move to set aside the default and default judgment until almost eight months after the default judgment had been entered. (*Ibid*.) The trial court denied the motion, finding, among other reasons, that it was untimely. (*Id*. at p. 1299.) Plaintiffs seize upon the language in *Sporn* noting that "'[t]he clerk's entry of default cuts off the defendant's right to take further affirmative steps such as filing a pleading or motion, and the defendant is not entitled to notices or service of pleadings or papers,'" for the proposition that Aqua, here, should have been prohibited from filing its ex parte applications. (*Id*. at p. 1301.) However, in *Sporn*, that language was directed at the defendant's contention that it was entitled to receive further notices regarding status and case management conferences, not, like here, whether it was entitled to file pleadings specifically dealing with setting aside the judgment of default. (*Ibid*.) Indeed, in *Sporn* the trial court permitted the defendant to file two ex parte

applications for stay and the motion to set aside the default and default judgment after the default judgment had been entered. (*Id*. at p. 1298.)

In *Hanson v. Hanson* (1960) 178 Cal.App.2d 756, 756, the appellant's default for failure to answer was entered. (*Id*. at p. 757.) Nevertheless, the court heard the matter on its merits, even permitting the appellant to take the stand. The trial court then entered a judgment against the appellant. The appellant appealed, contending the trial court erred in entering judgment against him because the appellant had no notice of the trial and the court had refused him a requested continuance. The appellate court affirmed, noting that "[s]ince [the] appellant's default had been taken, he was not entitled to notice and had no standing to ask for a continuance." (*Ibid*.) Moreover, the court noted that the appellant was given "more consideration than he was entitled to." (*Ibid*.) Thus, plaintiffs maintain that Aqua had no standing to file its ex parte applications. However, again, our case differs in the fact that Aqua's filings specifically related to the filing of a motion to vacate the judgment of default. In *Hanson*, the appellant's request for notice of trial and for a continuance in no way dealt with the default entered against him. Thus, the *Hanson* appellant had no standing to file documents or make requests regarding the resolution of the matter on the merits because he had not even attempted to relieve the default entered against him.

Aqua cites *Falahati v. Kondon* (2005) 127 Cal.App.4th 823, for the proposition that "[a] defendant suffering an erroneous default judgment has [only] three potential avenues of relief: a direct appeal from the judgment, a motion to set aside the judgment and a collateral attack on the judgment." (*Id*. at pp. 829-830, fn. omitted.) Here, again,

Aqua's ex parte applications related directly to its attempt to implement one of these very avenues of relief: the filing of a motion to set aside the judgment. Under section 473, subdivision (b), the court is empowered to relieve a party "upon any terms as may be just . . . from a judgment, dismissal, order, *or other proceeding* taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect." (Italics added.) Thus, the court here acted well within its discretion in permitting the filing and granting of Aqua's ex parte applications. Here, the ex parte applications related directly to the filing of a motion to set aside the default judgment. The judgment of default was entered on June 6, 2008. The ex parte applications were filed on June 19, 2008. On June 23, 2008, only four days later, Aqua filed its motion to set aside the default judgment. Thus, where a defendant timely seeks to vacate a judgment of default, any prior filing that directly relates to that motion is properly filed and considered.

C. Motion to Vacate the Default Judgment

A motion to vacate a default and default judgment under section 473 is reviewed for abuse of discretion. (*Parage v. Couedel* (1997) 60 Cal.App.4th 1037, 1041; *Davis v. Kay* (1973) 34 Cal.App.3d 680, 683.) "'[B]ecause the law strongly favors trial and disposition on the merits, any doubts in applying section 473 must be resolved in favor of the party seeking relief from default. [Citations.]' [Citation.]" (*Parage*, at p. 1042, quoting *Elston v. City of Turlock* (1985) 38 Cal. 3d 227, 233.) When the trial court makes factual findings in connection with a motion under section 473, we affirm those findings if they are supported by substantial evidence. (See *Milton v. Perceptual Development Corp.* (1997) 53 Cal.App.4th 861, 867.) Under that standard, "[a]n

appellate court's '. . . power begins and ends with a determination as to whether there is any substantial evidence to support [the factual findings]; [it has] no power to judge of the effect or value of the evidence, to weigh the evidence, to consider the credibility of the witnesses, or to resolve conflicts in the evidence or in the reasonable inferences that may be drawn therefrom.' [Citation.]" (*Orange County Employees Assn. v. County of Orange* (1988) 205 Cal.App.3d 1289, 1293, italics omitted.)

Plaintiffs contend that because Aqua had both actual and constructive notice of the suit, the court's grant of its request for relief from default was an abuse of discretion. We disagree.

The persons who may be served on behalf of a corporation are designated by section 416.10. Service of the summons and complaint upon someone not enumerated in the statute cannot be deemed "substantial compliance." (*Dill v. Berquist Const. Co., Inc*., (1994) 24 Cal.App.4th 1426, 1438-1439.) Likewise, actual notice of the lawsuit does not excuse a complete failure to comply with the statutory requirements for service. (*Summers v. McClanahan* (2006) 140 Cal.App.4th 403, 415.) Of course, the constitutional and statutory requirements regarding service of summons may be waived by a defendant so long as it is knowing and voluntary. (*D.H. Overmyer Co., Inc., of Ohio v. Frick Co.* (1972) 405 U.S. 174, 184-185.)

Here, by agreeing to accept service of process on behalf of Aqua, Gibbs, who was Aqua's attorney of record at the time, waived service of the summons and complaint in the manner prescribed pursuant to section 416.10. Nevertheless, Gibbs specified in his waiver that he would accept service on behalf of Aqua only in the manner set forth in his

letter: "by a Notice & Acknowledgement of Receipt" to him personally. There is no evidence in the record that Gibbs was an agent of Aqua in any manner other than his current representation of Aqua or that service to him on behalf of Aqua was authorized in any manner other than that provided for by Gibbs in his letter. It is undisputed that Aqua was not served in the manner prescribed by Gibbs. No notice and acknowledgement of receipt form was ever filed with the court. (See §§ 415.30, 417.10-417.30.)

Moreover, while the original summons and complaint was served on Hassan, a receptionist employed by Gibbs's firm, they were not served on Gibbs himself. As Aqua notes, the notice and acknowledgment of receipt form requires that it be signed on behalf of a corporation in the name of the entity or by a person authorized to receive service by such entity. Here, the "acknowledgement of receipt" signed for by Hassan was not in the name of Aqua nor in the name of one authorized to receive service on behalf of Aqua. Finally, service of the first amended complaint was not made in the manner provided pursuant to section 416.10 or by that prescribed by Gibbs; rather, service was made by mail to Gibbs. Thus, service of neither the original summons and complaint nor the first amended complaint was made on Aqua by the statutorily prescribed method or that deemed acceptable by Gibbs. Therefore, substantial evidence supported the trial court's order granting Aqua's motion to vacate the judgment of default because Aqua was not properly served.

Plaintiffs contend that their service of process on Gibbs was proper. (*Khourie v. Sabek* (1990) 220 Cal.App.3d 1009, 1013.) In *Khourie* the plaintiff attempted service of process on the defendant corporation by appearing at its place of business to serve its

agent of process. (*Id*. at p. 1012.) The door was locked so the process server rang the bell. A woman appeared at the door but refused to unlock the door or tell him her name even after he told her his purpose. The process server explained that he was leaving the summons and complaint just outside the door and the woman watched as he did so. Six days later, a copy of the summons and complaint was mailed to the defendant's place of business. More than one month thereafter, the plaintiff wrote to the defendant informing it that the defendant had been served with the summons and complaint and that if no pleading was filed by a specified date, the plaintiff would seek entry of default. The defendant responded that it had not been served. The defendant requested a 60-day extension to file a response and the plaintiff informed the defendant it would grant it a one-week extension; however, no response was filed. Default and judgment were later entered against the defendant. (*Ibid*.) The defendant filed a motion to set aside the default and default judgment and the trial court denied the request. (*Id*. at pp. 1012-1013.)

The appellate court affirmed the judgment holding that the purpose of the statutory directives regarding service of process "is to permit service to be completed upon a good faith attempt at physical service on a responsible person, plus actual notification of the action by mailing the summons and complaint to the appropriate party." (*Khourie v. Sabek, supra*, 220 Cal.App.3d at p. 1013.) "It is established that a defendant will not be permitted to defeat service by rendering physical service impossible." (*Ibid*.)

In *Trustees of Southern California IBEW-NECA Pension Plan v. Sabco Electrique, Inc*. (C.D. Cal., Sept. 15, 2008, No. CV07-7894) 2008 WL 4297223, the plaintiff's

process server left copies of the summons and complaint with the receptionist for the defendant corporation's designated agent for service of process. (*Id.* at p. *1.) Copies of the summons and complaint were also mailed to the defendant the same day but the defendant failed to respond. Entry of default and a judgment of default were entered thereafter. Eight months after service of the summons and complaint, nearly seven months after service of the request for entry of default, and more than a month after judgment was entered against it, the defendant filed a motion for relief from entry of default and judgment claiming excusable neglect. (*Ibid.*) The court denied the motion finding that the summons and complaint were properly served, the defendant's failure to respond was the result of its own culpable conduct, granting the defendant's motion would prejudice the plaintiffs, and the defendant failed to state a meritorious defense. (*Id.* at pp. *2-5.)

Here, plaintiffs did not attempt to personally serve Aqua with either the original or the first amended complaint at its corporate office. Nor did they attempt to serve Aqua's designated agent. To the extent plaintiffs contend Gibbs was Aqua's designated agent, he could be construed so only to the limited degree contained in his communication with them, i.e., for purposes of service of the summons and complaint in this particular case upon execution of notice and acknowledgment of receipt. Moreover, plaintiffs never mailed a copy of the original summons and complaint to Gibbs thereafter. Furthermore, nothing in plaintiffs' papers indicated that personal service on Gibbs was made impossible. Plaintiffs never attempted personal service of the first amended summons and complaint on Aqua. Thus, both *Khourie* and *Trustees* are distinguishable.

In both *Pasadena Medi-Center Associates v. Superior Court* (1973) 9 Cal.3d 773, 776, and *Gibble v. Car-Lene Research, Inc.* (1998) 67 Cal.App.4th 295, 313, the courts held that service upon a corporate agent with ostensible authority to accept service suffices to acquire jurisdiction over the corporation. "'Ostensible authority is such as a principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess.'" (*Pasadena*, at p. 780.) Here, insofar as Aqua caused plaintiffs to believe that Gibbs was its agent for purposes of service, it did so only to the extent that he had the power to accept service of process in the narrow manner he himself conveyed to them, i.e. personal service upon his person with execution of notice and acknowledgement of receipt. Unlike in both *Pasadena* and *Gibble*, Gibbs was not a mistakenly identified corporate officer of Aqua with ostensible authority to accept service in any legal manner. Moreover, plaintiffs can show no good faith reliance on Gibbs's statements to believe it could serve him in the manner it did. Therefore, plaintiffs cannot show they incurred detriment upon any such reliance. (*Pasadena*, at p. 780.)

Plaintiffs contend that service of process upon Aqua's attorney is sufficient if he is authorized by the corporation to receive service of process on its behalf. (*Warner Brothers Records, Inc. v. Golden West Music Sales, Inc.* (1974) 36 Cal.App.3d 1012, 1017-1018.) However, *Warner*'s determination was based upon its conclusion that the defendant's attorney was its agent because his longstanding, numerous, and continuous rendering of services on their behalf made it "'highly probable' that defendants would receive actual notice of the service of process . . . ." (*Id.* at p. 1018.) Here, no evidence established that Gibbs had any such close and enduring relationship with Aqua such that

he could be deemed its agent for such broad purposes as service of process outside the method he specifically dictated.

Plaintiffs additionally claim that the court erred in granting Aqua's motion because Aqua failed to specify the ground upon which the motion was made: "In fact, the only reference to [section] 473 is buried in Aqua's cursory and conclusory one-sentence argument in its points and authorities." Of course, that "buried" sentence was the bold-faced, capitalized heading for Aqua's itemized basis No. "III" for setting aside the default judgment. Itemized basis No. "II" indicated that service of the first amended complaint was insufficient. Likewise, itemized basis No. "IV" indicated that plaintiffs had failed to notify Aqua of their efforts to obtain a default judgment against it. Aqua's motion for shortening the time to file the motion to set aside the default judgment repeatedly noted that the prospective motion would be based on section 473. Thus, while not specifically stating which ground under section 473 Aqua was seeking relief, it could come as no "surprise" to plaintiffs that the implied ground was "surprise" or "mistake" in that Aqua had not been properly served with the operative complaints and, therefore, did not believe it was required to respond. The trial court did not abuse its discretion in granting Aqua's motion on that basis.

Finally, plaintiffs maintain that Aqua had actual or constructive knowledge of the summons and complaint in that Gibbs had prospectively agreed to accept service on behalf of Aqua; actually received service on behalf of the French defendants; and that the French defendants, officers of Aqua, filed answers demonstrating that they had knowledge of the summons and complaint. Indeed, Aqua conceded that Gibbs had actual

knowledge of the suit. Plaintiffs note, "'"[A]ctual notice" in section 473.5 "means genuine knowledge of the party litigant . . . ." [Citation.]' [Citation.] '"[A]ctual knowledge" has been strictly construed, with the aim of implementing the policy of liberally granting relief so that cases may be resolved on their merits. [Citation.]' [Citation.] We review the court's findings regarding actual notice of the action for an abuse of discretion. [Citation.]" (*Ellard v. Conway* (2001) 94 Cal.App.4th 540, 547.)

Here, the trial court made no determination regarding whether Aqua had actual notice of the suit; it merely granted Aqua's request finding that Aqua had not been properly served. However, as Aqua points out, it moved for relief under section 473, not section 473.5. Thus, we cannot say that it was an abuse of discretion for the trial court to grant Aqua's motion as it obviously found that Aqua was genuinely surprised that it should have been required to respond, because it believed it had not been properly served. Substantial evidence supports this determination. As discussed above, Aqua had a legitimate claim that it had not been properly served. Moreover, Aqua mistakenly noted that it believed the action was a shareholder derivative suit wherein the corporation was often named as a nominal defendant, but was not a party. Also, Hassan declared that she did not recall whether the language written beneath her signature, indicating receipt of the summons on behalf of Aqua, existed at the time she signed it. Likewise, she averred that she was not authorized to accept service of the Summons and Complaint on behalf of that client and that she "did not show the letter to Mr. Gibbs because [she] did not believe that it had any legal significance, other than establishing that [she] had physically received the letter." The original summons and complaint was not served by mail on Gibbs thereafter,

nor was the first amended complaint personally served on Gibbs. The trial court acted within its discretion in determining that Aqua had not been properly served and that policy reasons favoring a determination of the suit on its merits dictated that Aqua's motion should be granted.

DISPOSITION

The judgment is affirmed. Respondent is awarded its costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

/s/ MILLER
J.

We concur:

/s/ HOLLENHORST
Acting P. J.

/s/ GAUT
J.